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NO. 84-837

In The

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL JACOBS,

Petitioner

V.

STATE OF CONNECTICUT,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

Did the Connecticut Supreme Court violate due process when it held that it would not consider an oral request to charge on a lesser included offense thereby not reviewing the issue on state procedural grounds which rule was not questioned in either the state trial court or state appellate court?

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Pursuant to Rule 34.2 of the Rules of the United States Supreme Court the Respondent is satisfied with the sections of the Petitioner's Brief designated as: Opinion Below, Jurisdiction, Constitutional and Statutory Provisions Involved, and Statement of the Case and therefore accepts their presentation.

ARGUMENT

REASONS FOR DENYING THE WRIT

The Connecticut Supreme Court in this case invoked a widely used procedural rule which requires all requests to charge be in writing to deny the Petitioner's claim that the jury should have been instructed on a lesser included offense. In the Petition for Certiorari the Petitioner for the first time seeks to attack the constitutionality of the procedural rule. *Connecticut Practice Book* § § 852 and 854. This rule parallels quite closely *Fed. R. Civ.* P. 51 and *Fed. R. Crim.* P. 30. Oral requests to charge have been disparaged in Connecticut for over seventy years. *Bogudski v. Backes*, 83 Conn. 208, 214, 76 A. 272 (1910).

The Petitioner's due process claim that the declination of the Connecticut Supreme Court to decide the issue of the applicability of a lesser included offense to the facts of the case based solely on its procedural rules was never presented to the trial court or to the appellate court. Only in a motion to reargue filed subsequent to the issuance of the appellate opinion did the Petitioner set forth the grounds upon which he now seeks this Writ. Pet. App. 12a-19A. Connecticut is a notice pleading state. Under section 3012(a) of the Connecticut Practice Book, counsel who desire to place an issue for consideration before the Connecticut Supreme Court on appeal to that tribunal must include that issue within the preliminary statement of the issues. Failure to embrace this issue within the preliminary statement of the issues will foreclose him from briefing, arguing or otherwise presenting the issue to the appellate court. *Frumento v. Mezzanette*, 192 Conn. 606, 616 n. 8, 473 A. 2d 1193 (1984); *Meyers v. Manson*, 192 Conn. 383, 398 n. 12, 472 A. 2d 759 (1984); *Verrastro v. Sivertsen*, 188 Conn. 213, 218, 448 A. 2d 1344 (1982). The Connecticut Supreme Court will relax this rule at times in an effort to hear an issue which may be plain error or in the interests of justice or which involves a constitutional issue. *State v. Ouellette*, 190 Conn. 84, 101 n. 13, 459 A. 2d 1005 (1983); *State. v. Martin*, 185 Conn. 260, 265-266 n. 9, 440 A. 2d 927 (1981).

Despite the procedural requirements enunciated by the Connecticut Rules the Petitioner admits that the issue sought to be argued before this Court was never presented to any court unitl his motion to reargue. In Connecticut this motion is decided without oral argument and without opinion. The purpose of such a motion is to afford counsel a last opportunity to convince the Connecticut Supreme Court that its opinion was erroneous. 5 *Am. Jur. 2d*, Appeal and Error, Sections 986-987; Maltbie, *Connecticut Appellate Procedure* (2d), Section 320. It has been stated that it is too late to inject a constitutional claim in a motion to reargue made to the state court. Wright, *Federal Courts* §107 (3rd ed. 1976). Nor may a rehearing motion bring up new issues. Stern, *Appellate Practice*, §9.1 (1st ed. 1981).

This court will not consider questions that were not raised at all in the state court. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). Even if an issue is properly raised in the trial court it may be waived by failure to preserve it on appeal. *Beck v. Washington*, 369 U.S. 541, 549-553 (1962); *Herndon v. Georgia*, 295 U.S. 441 (1935). Unless the issue here was presented to the Connecticut courts in such a manner that it was necessarily decided by the Connecticut Supreme Court then this Court would have no power to consider it. *Street v. New York*, 394 U.S. 580, 581-582 (1969). On the basis of the foregoing the State of Connecticut urges that the Petition for Writ of Certiorari be denied since the claimed constitutional issue was never properly presented to the state court. The Petitioner can still avail himself of a writ of habeas corpus to raise the issue. He is not foreclosed if he fails to obtain certiorari. The Connecticut Supreme Court decided the entire issue of lesser included offenses on an independent and adequate state ground. *Michigan v. Tyler*, 436 U.S. 499, 512 (1978); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *Bilby v. Stewart*, 246 U.S. 255, 257 (1918).

CONCLUSION

The Petitioner's Petition for a Writ of Certiorari should be denied since the constitutional issue it purports to raise was never presented to either the state trial court or the state's supreme court. Neither at trial or in the brief or oral argument or in the opinion of the Connecticut Supreme Court does a constitutional issue appear. It was only in a motion to reargue that the Petitioner for the first time refers to his constitutional stand. The untimeliness of this effort to transform a state procedural issue into a federal constitutional claim is apparent. The Petitioner has failed also to present a substantial federal question or to display to the Court any conflicting decisions between the various courts on the issue presented.

Respectfully submitted,

/s/ RICHARD F. JACOBSON
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Assistant State's Attorney
Judicial District of Fairfield
Part A

CERTIFICATION

This is to certify that three copies of the foregoing have been mailed this date, postage prepaid, to Attorney Richard Emanuel, 144 Golden Hill Street, P.O. Box 71, Bridgeport, Connecticut 06601.

/s/ RICHARD F. JACOBSON
RICHARD F. JACOBSON

December 21, 1984.